

1990

# Ancillary Discovery to Prove Denial of Justice

Roger P. Alford

*Notre Dame Law School*, [ralford@nd.edu](mailto:ralford@nd.edu)

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [International Law Commons](#)

---

## Recommended Citation

Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 Va. J. Int'l L. 127 (2012).

Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/405](https://scholarship.law.nd.edu/law_faculty_scholarship/405)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# Ancillary Discovery to Prove Denial of Justice

ROGER P. ALFORD\*

---

Introduction.....	127
I. International Law on Denial of Justice.....	129
II. Ancillary Discovery Under Section 1782 .....	133
A. Ancillary Discovery in Aid of International Arbitration.....	133
B. Discovery Standards Under Section 1782.....	139
III. The Case Study of <i>Chevron v. Ecuador</i> .....	142
IV. Implications .....	147
A. The Comity of Courts .....	147
B. American-Style Discovery in International Proceedings .....	149
C. Evidentiary Forum Shopping.....	151
D. Two-Level Games and Altering Incentives .....	153
Conclusion .....	155

## INTRODUCTION

Today foreign investors have a new and powerful weapon to challenge denial of justice. Bilateral investment treaties (BITs) require “fair and equitable treatment” consistent with customary international law, including “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”<sup>1</sup> Those treaties also

---

\* Professor of Law, Notre Dame Law School. J.D. New York University; LL.M. University of Edinburgh. The research assistance of Brendan P. Geary is greatly appreciated. The article was submitted as part of the Virginia Journal of International Law’s addressing “Conflicts of Interest: Resolving Differences in Global Legal Norms” in Charlottesville, Virginia on February 10, 2012. Comments and questions from Peter “Bo” Rutledge, Donald “Trey” Childress, Ken Anderson, Doug Cassel, Jay Tidmarsh, Paolo Carozza, Mary Ellen O’Connell, Paul Dubinsky, Gregory Fox, Charles “Chip” Brower, and Paul Stephan are gratefully acknowledged.

1. *See, e.g.*, Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) art. 10.5, Aug. 5, 2004, available at <http://tinyurl.com/azavmvp> (last visited Apr. 20, 2012); United States-

create a private right of action, empowering investors with the right to initiate international arbitral proceedings directly against the host state. Thus, BITs provide the substance and the means for the effective review of judicial behavior.

These treaties do not stand alone. They are part of an elaborate system of international scrutiny of national courts. A key emerging component of this system is ancillary discovery to prove denial of justice. Pursuant to these bilateral investment treaties, international tribunals sit in judgment on domestic judicial misconduct; and pursuant to federal law, federal courts assist in the discovery of such misconduct. Far from deferring to the judicial acts of other sovereigns, federal courts are the handmaidens of international tribunals, adjudicating foreign judicial misconduct, and unearthing evidence that would be impossible to discover otherwise.

The Article proceeds in four parts. Part I reviews international law standards with respect to denial of justice, and surveys the use of investment arbitration to enforce that law. While denial of justice has a long pedigree, the proliferation of investment arbitrations pursuant to BITs provides an effective vehicle to adjudicate such misconduct. Sovereigns now vest international tribunals with the power to sit in judgment on their domestic courts.

In Part II, the article explores the burgeoning trend of pursuing ancillary discovery under 28 U.S.C. § 1782 to aid international tribunals. As one court put it, Section 1782 “creates an ancillary remedy to further the just resolution of litigations and arbitrations in other *fora*.”<sup>2</sup> Federal courts uniformly agree that Section 1782 applies to investment arbitration and they routinely order liberal, American-style discovery in aid of such international proceedings.

Part III presents the ongoing dispute between Chevron and Ecuador as a paradigmatic example of the use of ancillary discovery to prove denial of justice. Section 1782 proceedings have resulted in at least fifty orders and opinions from federal courts across the country. The ability to request ancillary discovery has proven essential to Chevron’s denial of justice claims. Chevron has procured virtually all of the key evidence in support of its allegations through Section 1782 discovery.

Finally, Part IV addresses several implications regarding the use of ancillary discovery to prove denial of justice. These conclusions are that: (1) the use of Section 1782 in aid of international tribunals reflects sensitivity to the comity of courts, not the comity of nations, such that federal courts determining whether to order ancillary discovery should

---

Uruguay Bilateral Investment Treaty art. 5, Nov. 4, 2005, 44 I.L.M. 268; United States-Rwanda Bilateral Investment Treaty art. 6(5), Feb. 19, 2008, S. TREATY DOC NO. 110-23.

2. *In re Application of Chevron Corp. (Berlinger)*, 709 F.Supp.2d 283, 302 (S.D.N.Y. 2010) *aff’d* *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).

consider the international tribunal's receptivity to such assistance, but not the attitude of the foreign sovereign responding to allegations of international law violations; (2) Section 1782 reflects a congressional intent to allow interested parties to avail themselves of liberal discovery under the Federal Rules of Civil Procedure, resulting in the indirect incorporation of American-style discovery into international proceedings; (3) liberal discovery pursuant to Section 1782 promotes evidentiary forum shopping, encouraging parties to pursue ancillary discovery in the United States rather than rely on the discovery procedures available in international arbitration; and (4) providing foreign investors with a remedy for denial of justice, together with a robust means to prove such a violation, alters the host state's incentives and requires it to play a two-level game that reconciles international obligations with domestic political preferences.

## I. INTERNATIONAL LAW ON DENIAL OF JUSTICE

Procedural due process is a fundamental human right. Article 10 of the Universal Declaration of Human Rights provides that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him."<sup>3</sup> Similarly, Article 6 of the European Convention on Human Rights provides that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."<sup>4</sup>

International law has been particularly concerned with the treatment of foreigners in domestic judicial proceedings. Guarantees of procedural due process for aliens in a foreign land have a longstanding pedigree.<sup>5</sup> One

---

3. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 10, U.N. Doc A/RES/217(III) (Dec. 10, 1948).

4. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); *see also* International Convention on Civil and Political Rights art. 14, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.").

5. For a discussion of the historical antecedents of the doctrine, *see, e.g.*, EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 100 (1915); ALWYN V. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1938); JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 10–38 (2005); STEPHEN M. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* 66 (1987); CHARLES DE VISSCHER, *LE DENI DE JUSTICE EN DROIT INTERNATIONAL*, 52 *HAGUE RECUEIL* 370 (1935); G.G. Fitzmaurice, *The Meaning of the Term "Denial of Justice"*, 13 *BRIT. Y.B. INT'L L.* 108 (1932); Hans Spiegel, *Origin and Development of Denial of Justice*, 32 *AMER. J. INT'L L.* 63 (1938).

historian writing in 1938 dated the origins of denial of justice back to the thirteenth century as the legal justification for acts of reprisal.<sup>6</sup>

[R]eprisals . . . came to be a measure which in comparatively early days aimed at enforcing the right of foreigners to protective justice, and [were] not permissible unless there was a denial of justice . . . . [A]t the present time denial of justice does not lead to self-help on the part of the injured party, and, as a rule, not even to reprisals. It leads merely to a peaceful reclamation by the state and, in certain cases, the dispute is settled amicably by an arbitral award.<sup>7</sup>

As for its content, one well-known historical formulation summarized the international minimum standard for due process:

[T]he foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.<sup>8</sup>

Under international law, the term of art given for violations of fundamental due process is the “denial of justice.” Today the modern concept of denial of justice is broad, encompassing both outside interference in judicial proceedings and misconduct on the part of the judiciary itself.<sup>9</sup> The former category encompasses issues such as (1) access to courts;<sup>10</sup> (2) legislation targeting foreigners;<sup>11</sup> (3) repudiation of an agreement to arbitrate;<sup>12</sup> (4) governmental interference in the courts;<sup>13</sup> (5)

---

6. See Spiegel, *supra* note 5, at 66.

7. *Id.* at 81.

8. *Ambatielos Claim (Greece v. U.K.)*, 23 I.L.R. 306, 325 (Arb. Comm’n. 1956).

9. See PAULSSON, *supra* note 5, at 131–206.

10. *Ambatielos*, 23 I.L.R. at 325; *Golder v. United Kingdom*, 1 Eur. H.R. Rep. 524, 531–36 (1975).

11. *Société des Grands Travaux de Marseille v. East Pakistan Dev. Corp.*, ICC Case No. 1803 (1972), *excerpted in* COLLECTION OF ICC ARBITRAL AWARDS 1974–1985, at 44 (Sigvard Jarvin & Yves Derains eds., 1990) (“[T]he notion that a debt should become void and indeed nonexistent *ab initio* for no better reason than that the debtor has chosen to put it in dispute is an extreme example of what natural justice abhors . . . . It is a flagrant abuse of right.”).

12. *Stran Greek Refineries and Stratis Andreadis v. Greece*, App. No. 13427/87 301-B. Eur. Ct. H.R. (ser. A), para. 50 (1994); *Himpurna Calif. Energy Ltd. v. Republic of Indonesia*, Final Award (Oct. 16, 1999) XXV Y.B. COMM. ARB. 109, 182–83 (2000).

13. Robert E. Brown (U.S. v. Gr. Brit.), (Nov. 23, 1923), VI RIAA 120, 129; *Jacob Idler v. Venezuela* (1885), *reprinted in* J.B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE U.S. HAS BEEN A PARTY, 3425, 3516–17 (1898).

manipulation in the composition of the courts;<sup>14</sup> (6) excessive public pressure;<sup>15</sup> and (7) failure to execute judgments.<sup>16</sup> The latter includes issues such as (1) a refusal to judge;<sup>17</sup> (2) undue delay;<sup>18</sup> (3) illegitimate assertion of jurisdiction;<sup>19</sup> (4) due process violations;<sup>20</sup> (5) discrimination or prejudice;<sup>21</sup> (6) corruption;<sup>22</sup> (7) arbitrariness;<sup>23</sup> (8) retroactive application of laws;<sup>24</sup> and (9) bad faith and gross incompetence.<sup>25</sup>

In addition to the customary international law standard for denial of justice, many BITs have adopted a *lex specialis* that guarantees greater investor protections for procedural due process.<sup>26</sup> For example, the United States-Ecuador BIT provides in Article II(7) that “[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”<sup>27</sup> That provision, which also appears in the Energy Charter<sup>28</sup> and several other U.S. BITs, is a “distinct and potentially less-demanding test . . . as compared to denial of justice under customary international law.”<sup>29</sup> While denial of justice under customary international law requires “egregious conduct that ‘shocks, or at least surprises, a sense of judicial propriety,’” this lesser standard requires a mere “failure of domestic courts to enforce rights ‘effectively.’”<sup>30</sup>

Until recent decades, the denial of justice was frequently a wrong without a remedy.<sup>31</sup> Foreign investors aggrieved at their treatment in

---

14. MOORE, *supra* note 13, at 3516–17.

15. Abraham Solomon (U.S. v. Pan.), (June 29, 1933), VI RIAA 370, 372–73.

16. Antoine Fabiani (No. 2) (Fr. v. Venez.), (July 31, 1905), X RIAA 4878, 4883–900.

17. *Id.* at 4884–902; Azinian v. Mexico, (Nov. 1, 1999), 5 ICSID Reports 269, para.102; Mondev v. United States, (Oct. 11, 2002), 42 ILM 85 (2003), paras.126–127.

18. Chevron Corp. & Texaco Petroleum Co. v. Ecuador, Partial Award (Mar. 30, 2010), paras. 250, 272, available at <http://tinyurl.com/b54cc25>; Robert Azinian v. United Mexican States, (Nov. 1, 1999), 5 ICSID Rep. 272, para. 102 (2002).

19. MOORE, *supra* note 13, at 3514–15.

20. Loewen v. United States, 7 ICSID Rep. 442 paras. 132–37 (2005).

21. *Id.* para.135.

22. *Coles* 78 British & Foreign State Papers 1305, 1328 (1886).

23. Amco v. Indonesia, (Nov. 20, 1984), 1 ICSID Rep. 389, paras. 198–202 (1993).

24. Mondev v. United States, (Oct. 11, 2002), 42 I.L.M. 85 (2003), paras. 137–38.

25. Jacob Idler v. Venezuela, Moore, Arbitrations, 3491, 3510; The Orient (U.S. v. Mex., Moore, Arbitrations, 3229–31; Azinian v. Mexico, (Nov. 1 1999), 5 ICSID Rep. 272, para. 103 (2002).

26. KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 411 (2009).

27. United States-Ecuador Bilateral Investment Treaty, U.S.-EC, Aug. 27, 1993, S. TREATY DOC. NO. 103-15, art. II(7).

28. Energy Charter, art. 10(12) Dec. 17, 1991.

29. Chevron Corp. & Texaco Petroleum Co. v. Ecuador, Partial Award (Mar. 30, 2010), para. 244, available at <http://tinyurl.com/b54cc25>.

30. *Id.*

31. See Alexis Mourre & Alexandre Vagenheim, *Some comments on Denial of Justice in Public International Law After Loewen and Saipem*, in BERNADO CREMADES, LIBER AMICORUM: SOME COMMENTS ON DENIAL OF JUSTICE IN PUBLIC AND PRIVATE INTERNATIONAL LAW 848 (M.A. Fernández-Ballesteros & David Arias, eds., 2010).

domestic proceedings had few choices to redress their plight. By the early 20<sup>th</sup> century, reprisals and self-help were off the table, and the only other viable option — the diplomatic espousal of claims pursuant to a friendship, commerce, and navigation treaty (FCN) or similar treaties — were cumbersome and rare events.

The seminal development that altered this course of events was the rise of bilateral investment treaties. These BITs incorporated guarantees of minimum due process and afforded investors the right to arbitrate denial of justice claims directly against the host state before impartial and independent international tribunals. At the end of the Cold War there were fewer than 400 bilateral investment treaties.<sup>32</sup> Today almost 180 countries have entered into over 2,600 BITs.<sup>33</sup> Pursuant to these treaties, nations are now under an international legal obligation to guarantee foreign investors a minimum standard of due process in domestic court judicial proceedings, and sovereigns authorize international tribunals to examine and remedy instances that fall below that standard.

The posture of these international tribunals is in marked contrast to the deference and coordination that occurs between domestic courts, where there are well-developed principles for addressing the allocation of judicial authority between sovereign states.<sup>34</sup> The sovereign equality of states is a central feature of that allocation. Among the guidelines for allocating judicial authority is the longstanding principle that

[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means to be availed of by sovereign powers as between themselves.<sup>35</sup>

Now, with the formation of international tribunals, sovereign states have established an effective means to redress grievances arising from government misconduct: empowering these international tribunals to sit in judgment on the acts of government, including acts of the judiciary. Given

---

32. Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 655 (1990) (referencing that there were 309 BITS in 1989); UNCTAD Analysis of BITS, available at <http://tinyurl.com/bfpxdxv> (referencing that there were 385 BITS in 1989).

33. M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 172 (3d ed. 2010).

34. These principles include decisions on whether to dismiss legal actions on the basis of *forum non conveniens*, *lis alibi pendens*, choice of forum clauses, international comity, and the act of state doctrine. Closely related are decisions regarding whether to recognize and enforce foreign judgments. See Christopher Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 77–80 (2009).

35. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

the efficacy of this nascent system, it is not surprising that denial of justice claims are on the rise.<sup>36</sup>

## II. ANCILLARY DISCOVERY UNDER SECTION 1782

The decision to launch an investment arbitration against a host state triggers a series of procedural weapons to discover the breadth and depth of an alleged international law violation. One of the most important of these is found in 28 U.S.C. § 1782, which empowers federal courts to order any person within its jurisdiction to be deposed or produce documents upon the request of any interested person. Section 1782 provides in relevant part:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.<sup>37</sup>

This procedural device has only recently been applied in the international arbitration context, but its impact has been impressive. In one landmark case involving allegations of judicial impropriety, a series of Section 1782 orders were critical to bolster allegations of a widespread conspiracy to commit fraud in securing an \$18 billion Ecuadorian court judgment against a U.S. corporation.

### A. *Ancillary Discovery in Aid of International Arbitration*

Before 2004 it was widely assumed that Section 1782 discovery orders were unavailable in aid of international arbitration.<sup>38</sup> The two federal circuits that addressed the issue both found that an international arbitral panel established by private parties was not an “international tribunal” within the meaning of the statute. In *NBC v. Bear Stearns*, the Second Circuit held that Section 1782 was “intended to cover governmental or

---

36. Mourre & Vagenheim, *supra* note 31, at 858.

37. 28 U.S.C. § 1782(a).

38. See, e.g., Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 679 n.13 (2003) (noting that U.S. courts have rejected a broad definition of international tribunal for “there is nothing in the text or legislative history to support such a broad definition and it would require federal courts to provide greater assistance to foreign and international private arbitral tribunals than to wholly domestic arbitral tribunals”).



intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies” and that “Congress did not intend for that statute to apply to an arbitral body established by private parties.”<sup>39</sup> Likewise, in *Republic of Kazakhstan v. Biedermann International*, the Fifth Circuit concluded that “the term ‘foreign and international tribunals’ in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations. The provision was enlarged to further comity among nations, not to complicate and undermine the salutary device of private international arbitration.”<sup>40</sup>

That changed in 2004 when the Supreme Court, in *Intel Corp. v. Advanced Micro Devices, Inc.*, addressed the scope of Section 1782 for the first time.<sup>41</sup> The critical question in *Intel* was whether antitrust proceedings before the European Commission — the executive and administrative organ of the European Communities — constituted a “proceeding in a foreign or international tribunal” within the meaning of the statute. Given that the European Commission combined both prosecutorial and adjudicatory functions, the Supreme Court concluded that it had “no warrant to exclude the European Commission, to the extent that it acts as a first-instance decision-maker, from § 1782(a)’s ambit.”<sup>42</sup> It further held that a pending, rather than actual proceeding was sufficient to trigger Section 1782, as long as “a dispositive ruling by the Commission, reviewable by the European courts, [was] within reasonable contemplation.”<sup>43</sup>

Although the Supreme Court did not address international arbitration directly, its reasoning appeared to support a broad interpretation that would encompass arbitral tribunals, which likewise act as “first-instance decision-makers” that render “dispositive rulings” subject to limited national court review. Moreover, in describing the scope of Section 1782, the Court found that Congress amended the statute in 1964 to “provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad” and quoted scholarly commentary that defined the term “tribunal” to include “investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”<sup>44</sup>

The Court concluded with cautionary considerations that a federal court should exercise when ordering Section 1782 discovery; with particular focus on the subject, motive, nature, and context of the discovery request. Specifically, the Court encouraged lower courts to consider: (1) whether

---

39. *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190–91 (2d Cir. 1999).

40. *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999).

41. 542 U.S. 241 (2004).

42. *Id.* at 258.

43. *Id.* at 259.

44. *Id.* at 258 (citing Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71 (1965)).

the person from whom discovery is sought is a participant in the foreign or international proceeding; (2) whether the nature and character of the foreign tribunal would make judicial assistance appropriate; (3) whether the foreign or international court is receptive to federal court judicial assistance; (4) whether the discovery request conceals an attempt to circumvent foreign proof-gathering restrictions or other legitimate policies; and (5) whether the request is unduly intrusive or burdensome.<sup>45</sup>

In the wake of *Intel*, federal courts have struggled to apply the Court's liberal Section 1782 standards to the context of international arbitration. Lower courts are divided on the question of whether a contract-based private international arbitral panel satisfies the statutory definition of "international tribunal."<sup>46</sup>

A majority of courts have concluded that arbitral tribunals established by private contract are "foreign or international tribunals."<sup>47</sup> The Eleventh Circuit, for example, took *Intel's* functional approach and concluded that a contractually-based "arbitral panel is . . . 'a first-instance decision-maker' whose judgment is subject to judicial review, and we therefore 'have no warrant to exclude [it] . . . from § 1782(a)'s ambit."<sup>48</sup> Under this analysis, the functional approach adopted by the Supreme Court in *Intel* suggests that contract-based arbitral tribunals are first-instance decision-makers that issue decisions both responsive to the complaint and reviewable in court.<sup>49</sup> "[I]t is the function of the body that makes it a 'tribunal,' not its formal identity as a 'governmental' or 'private' institution."<sup>50</sup>

Other federal district courts have concluded that private arbitral tribunals are not "international tribunals" within the meaning of Section 1782.<sup>51</sup> These courts focus on arbitration as an alternative to litigation,

---

45. *Id.* at 264–65.

46. For a discussion of this case law, see Kenneth Beale et al., *Solving the § 1782 Puzzle: Bringing Certainty to the Debate over 28 U.S.C. § 1782's Application to International Arbitration*, 47 STAN. J. INT'L L. 51, 67–89 (2011); Jenna M. Godfrey, Comment, *Americanization of Discovery: Why Statutory Interpretation Bars 28 U.S.C. § 1782(a)'s Application in Private International Arbitration Proceedings*, 60 AM. U. L. REV. 475, 492–98 (2010).

47. See *In re Broadsheet L.L.C.*, 2011 WL 4949864, at \*2 (D. Colo. Oct. 18, 2011); *Government of Ghana v. ProEnergy Services, L.L.C.*, 2011 WL 2652755, at \*3 (W.D. Mo. June 6, 2011); *Ex rel Application of Winning (HK) Shipping Co. Ltd.*, 2010 WL 1796579, at \*3–10 (S.D. Fla. Apr. 30, 2010); *OJSC Ukrnafta v. Carpathy Petroleum Corp.*, 2009 WL 2877156, at \*2–5 (D. Conn. Aug. 27, 2009); *In re Babcock Borsig AG*, 583 F.Supp. 2d 233, 237–40 (D. Mass. 2008); *In re Hallmark Capital Corp.*, 534 F.Supp. 2d 951, 953–57 (D. Minn. 2007); *In re Roz Trading Ltd.*, 469 F.Supp. 2d 1221, 1223–28 (N.D. Ga. 2006).

48. *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 997 (11th Cir. 2012) (second and third alteration in original) (citation omitted); see also *Bobcock Borsig AG*, 583 F.Supp. 2d, at 240 ("There is no textual basis upon which to draw a distinction between public and private arbitral tribunals, and the Supreme Court in *Intel* repeatedly refused to place 'categorical limitations' on the availability of § 1782(a).") (citation omitted).

49. *In re Roz Trading*, 469 F.Supp. 2d at 1225.

50. *Id.* at 1228.

51. *In re Finserve Group Ltd.*, 2011 WL 5024264 (D.S.C. Oct. 20, 2011); *In re Application by*

foreclosing a key element of *Intel's* analysis: judicial review.<sup>52</sup> “[T]he very narrow circumstances in which [arbitral] decisions may be subject to review does not allow for judicial review of the merits of the parties’ dispute. Accordingly, the ‘arbitral tribunal’ at issue here does not fall within the definition the Supreme Court embraced in its *Intel* dictum.”<sup>53</sup> Moreover, the fact that the source of judicial authority is derived from private agreement likewise “militate[s] against classifying it as a foreign or international proceeding under § 1782.”<sup>54</sup> Finally, pragmatic concerns have loomed large in the analysis. “Interpreting § 1782 to apply to voluntary, private international arbitrations would be a body blow to such arbitration, since it would create a tremendous disincentive to engage in such arbitration wherever, as here, such a reading would create substantially asymmetrical discovery obligations.”<sup>55</sup>

Whatever doubts there may be about the application of Section 1782 to contract-based international arbitration, federal courts uniformly agree that an arbitral tribunal established pursuant to a bilateral investment treaty constitutes an “international tribunal” within the meaning of the statute. The focus of most Section 1782 litigation in the BIT context has not been on whether the statutory criteria have been satisfied, but whether the discretionary considerations outlined in *Intel* militate in favor or against granting discovery.

Since *Intel*, over twenty federal courts have considered motions to compel Section 1782 discovery in aid of proceedings before treaty-based investment arbitration tribunals.<sup>56</sup> Not a single federal court has held that

---

Rhodianyl S.A.S. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918 (D. Kan. Mar. 25, 2011); *In re An Arbitration in London, England, between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co., and Ace Bermuda Ltd.*, 626 F.Supp. 2d 882, 883–86 (N.D. Ill. 2009); *In re Application of Operadora DB Mexico, S.A.*, 2009 WL 2423138, at \*8–12 (M.D. Fla. Aug. 4, 2009); *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp.*, 617 F.Supp.2d 481, 485–487 (S.D. Tex. 2008), *aff'd* 341 Fed. Appx. 31, 2009 WL 2407189 (5th Cir. Aug. 6, 2009) (unpublished).

52. *Norfolk S. Corp.*, 626 F.Supp. 2d at 886; *El Paso*, 617 F.Supp. 2d at 485; *Operadora DB Mexico*, 2009 WL 2423138 at \*10.

53. *Norfolk S. Corp.*, 626 F.Supp. 2d at 886.

54. *Operadora DB Mexico*, 2009 WL 2423138 at \*11.

55. *Rhodianyl*, Case No. 11-1026-JTM at 31. Similarly, the Fifth Circuit, in an unpublished opinion, expressed concern that “empowering parties in international arbitrations to seek ancillary discovery through federal courts could destroy arbitration’s principal advantage as a ‘speedy, economical, and effective means of dispute resolution’ if the parties ‘succumb to fighting over burdensome discovery requests far from the place of arbitration.’” *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed. Appx. 31, 34 (5th Cir. 2009).

56. *In re Application of Chevron Corp.*, 650 F.3d 276 (3d Cir. 2011); *In re Application of Chevron Corp.*, 633 F.3d 153, 161, (3d Cir. 2011); *In re Application of Ecuador*, 2011 WL 4434816, at \*2 (N.D. Cal. Sept. 23, 2011); *In re Application of Ecuador*, 2011 WL 4089189, at \*2 (E.D. Cal. Sept. 13, 2011); *Republic of Ecuador v. Bjorkman*, 801 F.Supp. 2d 1121, 1124 (D. Colo. 2011), *aff'd* 2011 WL 5439681 (D. Colo. Nov. 9, 2011); *In re Republic of Ecuador*, 2011 WL 736868, at \*1–3, (N.D. Cal. Feb. 22, 2011); *In re Application of Chevron Corp.*, 762 F.Supp. 2d 242, 250–52 (D. Mass. 2010); *Chevron Corp. v. Shefftz*, 754 F.Supp. 2d 254, 260 (D. Mass. 2010); *In re Republic of Ecuador*, 2010

such arbitral tribunals fall short of the statutory definition of an “international tribunal.”<sup>57</sup>

The vast majority of these cases arose in the context of Chevron’s investment arbitration claim filed in September 23, 2009, against the Republic of Ecuador alleging that judicial proceedings in Ecuador violate the Ecuador-United States Bilateral Investment Treaty.<sup>58</sup> As noted above, that treaty guarantees fundamental due process, including the “effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”<sup>59</sup> It also authorizes investors to file an arbitration claim in accordance with the UNCITRAL Arbitration Rules.<sup>60</sup> Thus, the arbitration proceeding is established by treaty, with Ecuador consenting in advance to be subject to investment arbitration and the United States securing for its nationals, including Chevron, third-party beneficiary rights to pursue international law claims against Ecuador.

Rather than take a functional approach that analyzes whether the investment tribunal is a first-instance decision-maker rendering decisions subject to judicial review, these courts either assume that such arbitral panels are “international tribunals,” or focus on the fact that the arbitral tribunal has its origins in a bilateral investment treaty. Although the

---

WL 4973492, at \*6–8 (N.D. Cal. Dec. 1, 2010); *Berlinger*, 709 F.Supp. 2d 283, 291 (S.D.N.Y. 2010), *aff’d* *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d. Cir. 2011); *In re* Application of Caratube Int’l Oil Co., 730 F.Supp. 2d 101, 104–05 (D.D.C. 2010) (assuming without deciding that ICSID arbitration panels are “international tribunals”); *In re* Application of Chevron Corp. (*Donziger*), 749 F.Supp. 2d 141, 159–160 (S.D.N.Y. 2010); *In re* Application of Ricardo Veiga, 746 F.Supp. 2d 8, 22–23 (D.D.C. 2010); *In re* Chevron Corp., 753 F.Supp. 2d 536, 539 (D. Md. Nov. 24, 2010); *In re* Chevron Corp., 2010 WL 4883111, at \*2 n.2 (W.D. Va. Nov. 24, 2010) (determining that there was no need to decide whether an arbitral proceeding was an “international tribunal” in light of foreign proceeding in Ecuador); *In re* Republic of Ecuador, 2010 WL 4027740, at \*2 (E.D. Cal. Oct. 14, 2010); *In re* Republic of Ecuador, 2010 WL 3702427, at \*3 (N.D. Cal. Sept. 15, 2010); *Chevron Corp. v. Camp*, 2010 WL 3418394, at \*4 (W.D.N.C. Aug. 30, 2010); *Chevron Corp. v. Stratus Consulting, Inc.*, 2010 WL 2135217 (D. Colo. May 25, 2010); *Chevron Corp. v. Stratus Consulting, Inc.*, 2010 WL 1488010 (D. Colo. Apr. 13, 2010); Order, *In re* Chevron, No. 1:10-MI-0076-TWT-GGB (N.D. Ga. Mar. 2, 2010); *In re* Application of Oxus Gold PLC, 2006 WL 2927615 (D.N.J. Oct. 11, 2006).

57. In one unpublished order, a federal district court concluded that existing Fifth Circuit precedent controlled the question of whether arbitral tribunals are international tribunals within the meaning of Section 1782, and concluded that an investment arbitration tribunal was not an international tribunal. This order is on appeal to the Fifth Circuit. *See* *Republic of Ecuador v. Connor*, Case No. H-11-516 (S.D. Tex. Feb. 6, 2012).

58. Ecuador-United States Bilateral Investment Treaty, (Aug. 27, 1993), S. Treaty Doc. No. 103–15, available at <http://tinyurl.com/a4lbv5y>. Among the allegations are that the Republic of Ecuador (1) improperly exercised *de facto* jurisdiction over Chevron; (2) improperly assisted and colluded with the Lago Agrio plaintiffs in an effort to impose the state’s obligations on Chevron; (3) improperly influenced the Ecuador courts through public statements; and (4) abused the Ecuador criminal justice system to advance Ecuador’s improper goals. *See* *Chevron Corp. v. Republic of Ecuador*, Claimant’s Notice of Arbitration, (Sept. 23, 2009), at 15–16, available at <http://tinyurl.com/aac2dh>.

59. Bilateral Investment Treaty, *supra* note 58, art. II, para. 7.

60. *Id.* at art. VI.

absence of judicial review in the investment context is even more pronounced than in private commercial arbitration, this factor has not been featured in any of the decisions applying Section 1782 to investment arbitration. In short, federal courts take a functional approach in defining an “international tribunal” in the commercial arbitration context, and a formalist approach in the investment arbitration context.

In the investment arbitration context, the locus of discussion has been on the *Intel* discretionary factors. The question is not whether Section 1782 authorizes federal courts to aid investment arbitration, but rather, whether they should in light of *Intel*. The exercise of discretion is particularly important in the denial of justice context, because any decision to grant Section 1782 discovery will impact domestic court proceedings and international arbitration proceedings. *Intel* requires federal courts to scrutinize, among other things, the nature and character of the foreign or international proceedings, the foreign or international court’s receptivity to the discovery, and whether the discovery will circumvent restrictions imposed by the foreign or international court.<sup>61</sup> One cannot balance those factors without considering whether Section 1782 discovery will be used in aid of the domestic court proceedings, the international arbitral proceedings, or both.

For example, in *UBR*, the Third Circuit addressed the propriety of a Section 1782 discovery request designed to attack the credibility of the Ecuadorian court system, with Chevron alleging that Ecuadorian plaintiffs and their experts conspired with the Ecuadorian court to produce a fraudulent assessment of environmental damage.<sup>62</sup> Appellants UBR argued that Chevron did not seek discovery for “use in a proceeding before a foreign tribunal,” but rather “to attack the tribunal itself.”<sup>63</sup> The Third Circuit rejected the argument, finding that the evidence Chevron seeks would be used in the BIT arbitration to attack the Ecuadorian court, and this “unquestionably would be ‘for a use in a foreign or international tribunal.’ The fact that the evidence may be utilized to cast doubts on the impartiality of the Lago Agrio Court does not mean that Chevron’s request for the evidence runs afoul of Section 1782 and that therefore Chevron may not obtain the evidence.”<sup>64</sup>

As for the *Intel* discretionary factors, the question in *UBR* was not whether the Ecuadorian court would be receptive to discovery establishing that its judgment was procured by fraud, but rather whether the BIT arbitral panel would be receptive to such evidence. Any suggestion that

---

61. *Intel Corp. v. Advanced Microdevices, Inc.*, 542 U.S. 241, 264–65 (2004).

62. *In re Chevron*, 633 F.3d at 159–60.

63. *Id.* at 161.

64. *Id.*

“the BIT arbitral panel would not be receptive to the evidence,” the Third Circuit concluded, was based on “pure speculation.”<sup>65</sup>

Likewise, in *Berlinger*, the Southern District of New York rejected arguments that Section 1782 discovery would undermine the Ecuadorian court and therefore frustrate the comity interests underlying the statute.<sup>66</sup> The fact that the Ecuadorian courts might not be receptive to evidence of fraud to be used in international arbitration was of little consequence. Given that the “petitioners seek relief . . . out of concern that political influence may have been brought to bear in Ecuador in an inappropriate way,” opposition by the Ecuadorian courts “to these applications would not be dispositive.”<sup>67</sup>

In other words, the filing of an international arbitration challenging the administration of justice in a foreign court dramatically alters the exercise of *Intel* discretion. While the foreign court may not be receptive to discovery of judicial misconduct, such evidence will further arbitration proceedings adjudicating such questions. As the Southern District of New York reasoned in *Donziger*, “even if the Ecuadorian courts opposed these subpoenas . . . such opposition would not be dispositive . . . [S]ight must not be lost of the role of the discovery sought here in respect of the BIT arbitration. Certainly this discovery would be helpful to that tribunal.”<sup>68</sup>

#### B. *Discovery Standards Under Section 1782*

One of the most powerful weapons that a party can wield against its litigation adversary is American-style discovery. As one civil law practitioner put it, “[i]t is difficult to overstate the horror with which parties and counsel outside the United States view the prospect of American-style discovery, with parties able to serve upon one another sweeping requests for production of documents and other information relevant to the litigation, and to obtain oral deposition testimony of witnesses in advance of trial.”<sup>69</sup> Yet this is precisely what Section 1782 does in aid of international arbitration.

Once a federal court has determined that discovery is authorized and appropriate under Section 1782, the federal standards for discoverability are triggered. Section 1782 gives federal courts broad leeway in fashioning the scope of discovery, authorizing courts to “prescribe the practice and

---

65. *Id.* at 163.

66. *Berlinger*, 709 F.Supp. 2d 283, 292 (S.D.N.Y. 2010) *aff'd* *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d. Cir. 2011).

67. *Id.*

68. *Donziger*, 749 F.Supp. 2d 141, 161 (S.D.N.Y. 2010); *see also* *Chevron*, 2010 WL 4883111, at \*3 (W.D. Va. Nov. 24, 2010).

69. Javier Rubenstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT'L L. 303, 304 (2004).

procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing.”<sup>70</sup> But in the absence of such an order, the default rule is that “the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.”<sup>71</sup> As the legislative history emphasized:

[S]ection 1782 gives the court complete discretion in prescribing the procedure to be followed. It permits, but does not command, following the foreign or international practice. If the court fails to prescribe the procedure, the appropriate provisions of the Federal Rules of Civil Procedure are to be followed, irrespective of whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, or other nature.<sup>72</sup>

In practice, courts have applied this default rule, permitting parties to discover “any non-privileged matter that is relevant to any party’s claim or defense.”<sup>73</sup> The ramifications for applying the Federal Rules of Civil Procedure to Section 1782 discovery are profound, dramatically expanding the scope of discoverable evidence.

First, relevant information under Federal Rule of Civil Procedure 26(b)(1) “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>74</sup> That same liberal standard of relevance applies to Section 1782 discovery.<sup>75</sup> Any doubt as to whether the evidence is relevant should be resolved in favor of discovery.<sup>76</sup> This is particularly so in the Section 1782 context, where a district court’s only connection to the case is supervision of discovery ancillary to an action elsewhere, in which case the court

---

70. 28 U.S.C. § 1782(a) (2006); *see* *Kestrel Coal Pty. Ltd. v. Joy Global Inc.*, 362 F.3d 401, 404 (7th Cir. 2004) (holding that discovery “must conform either to the procedure of the foreign nation or to that of the Federal Rules of Civil Procedure”).

71. 28 U.S.C. § 1782(a) (2006); *see, e.g.*, *Kulzer v. Biomet, Inc.*, 633 F.3d 591, 595 (7th Cir. 2011) (“[D]iscovery sought under section 1782 must (in the absence of a contrary order by the district court) comply with Rule 26 and the other rules governing discovery in federal courts.”).

72. S. REP. NO. 88-1580 at 8 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3789.

73. FED. R. CIV. P. 26(b)(1); *see, e.g.*, *Weber v. Finker*, 554 F.3d 1379, 1384–85 (11th Cir. 2009); *In re Clerici*, 481 F.3d 1324, 1336 (11th Cir. 2007); *Chevron Corp. v. Shefftz*, 754 F.Supp. 2d 254, 264 (D. Mass. 2010); *In re Chevron Corp.*, 2010 WL 4883111, at \*4 (W.D. Va. Nov. 24, 2010); *In re Application of Eli Lilly*, 2010 WL 2509133, at \*3 (D. Conn. June 15, 2010); *In re Application Pursuant to 28 U.S.C. § 1782*, 249 F.R.D. 96, 106 (S.D.N.Y. 2008).

74. FED. R. CIV. P. 26(b)(1).

75. *Ghana v. ProEnergy Services, LLC*, 2011 WL 2652755, at \*6 (W.D. Mo. June 6, 2011) (“Discovery is as broad under § 1782 as it is under Fed. R. Civ. P. 26. Thus, if there is a possibility that the discovery *may* lead to information relevant to the subject matter of the action, then the discovery should generally be allowed.”).

76. *In re Application of Ricardo Veiga*, 746 F.Supp. 2d 8, 19 (D.D.C. 2010); *In re Application Pursuant to Section 28 U.S.C. § 1782*, 249 F.R.D. 96, 106 (S.D.N.Y. 2008).

“should be especially hesitant to pass judgment on what constitutes relevant evidence.”<sup>77</sup>

Second, Section 1782 authorizes a federal district court to order depositions or documentary evidence against any individual who “resides or is found” in the district, including third parties who are not named parties in the foreign proceeding. In one case, the Second Circuit affirmed a district court issuance of a Section 1782 order in aid of French litigation against a third party who lived and worked in France, but was “found” in New York — visiting an art gallery.<sup>78</sup> In another case, discovery was deemed appropriate based on the expectation that the individual would be found in the district in the near future.<sup>79</sup>

Third, Section 1782 authorizes a federal district court to order discovery in aid of international proceedings against *any* third party, regardless of how attenuated the relationship of that party to the litigants. In one case, Google was ordered to produce documents relating to email accounts it hosted that were opened and held by foreign nationals involved in foreign proceedings.<sup>80</sup>

Fourth, Section 1782 authorizes a federal district court to order discovery in aid of international proceedings “upon the application of *any* interested party.”<sup>81</sup> There is no requirement that the party requesting federal court discovery be a litigant in the foreign or international proceedings. As the Supreme Court emphasized, any person who “possesses a reasonable interest in obtaining judicial assistance . . . qualifies as an interested person” under Section 1782.<sup>82</sup>

This standard of discovery is remarkably different from the approach of evidence gathering in international arbitration. Discovery in the international arbitration context is a hybrid of civil and common law traditions. The civil law tradition, of course, employs the inquisitorial model, with discovery controlled by the courts and the parties having no power to demand relevant materials from one another, much less third parties. The evidence that is gathered by civil law courts is often that which the parties voluntarily proffer. Interrogatories, depositions, and adverse document production are alien concepts.<sup>83</sup>

---

77. *In re Honeywell Int'l. Inc.*, 230 F.R.D. 293, 301 (S.D.N.Y. 2008).

78. *In re Edelman*, 295 F.3d 171, 174, 180 (2d Cir. 2002) (“[W]e hold that if a person is served with a subpoena while physically present in the district of the court that issued the discovery order, then for purposes of § 1782(a), he is ‘found’ in that district.”).

79. *In re Oxus Gold PLC*, No. 06-82, 2006 WL 2927615, at \*5 (D.N.J. Oct. 11, 2006).

80. *See, e.g., In re Beluga Shipping GmbH & Co.*, 2010 WL 3749279, at \*4–5 (N.D. Cal. Sept. 23, 2010).

81. 28 U.S.C. § 1782(a) (emphasis added).

82. *Intel Corp. v. Advanced Microdevices, Inc.*, 542 U.S. 241, 256 (2004).

83. *See, e.g., Geoffrey Hazard, Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 NOTRE DAME L. REV. 1017 (1998) (discussing the differences between U.S. and foreign nations’ discovery standards and procedures); James Beardsley, *The Proof of Fact in French Civil Procedure*, 34 AM. J. COMP.



Modern international arbitration practice combines elements of both common law and civil law traditions. As far as oral evidence, the civil law tradition dominates; depositions are rare, and witness statements are the norm.<sup>84</sup> Interrogatories are similarly uncommon. On the other hand, document production in international arbitration roughly parallels the common law approach, but the standard for what is discoverable is much narrower. While there is no automatic right to demand documents of the opposing side, a party may request the arbitral tribunal to order another party to produce “a narrow and specific requested category of documents.”<sup>85</sup> Typically the tribunal will grant such request if it determines that the documents “are relevant to the case and material to its outcome.”<sup>86</sup> A party subject to such a production request may object to production if, among other things, the request is not sufficiently relevant, unreasonably burdensome, there are applicable privileges, or compelling reasons of fairness and equality against disclosure.<sup>87</sup> The tradition in international arbitration is to “refuse expansive, fishing-expedition discovery requests.”<sup>88</sup> Moreover, as a general rule international arbitral tribunals have no authority to request documents or oral testimony for third parties, and therefore a party’s ability to procure evidence from third parties will be limited accordingly.

Given these limitations, it is not surprising that ancillary discovery under Section 1782 is an attractive tool for American lawyers gathering evidence to prove denial of justice. Nor is it surprising that lawyers from other traditions view this trend with skepticism.

### III. THE CASE STUDY OF *CHEVRON V. ECUADOR*

The most important example of ancillary discovery to prove denial of justice is *Chevron v. Ecuador*. The dispute presents a case study of just how significant Section 1782 proceedings may be for international tribunals addressing allegations of foreign judicial misconduct.

The seminal event that precipitated Chevron’s allegations of denial of justice in Ecuador was the January 2009 screening of the film *Crude* at the Sundance Film Festival in Park City, Utah. The film documented the case

---

L. 459 (1986) (discussing French discovery procedures for civil trials); Volker Triebel, *An Outline of the Swiss/German Rules of Civil Procedure and Practice Relating to Evidence*, 47 ARB. 221 (1982).

84. INT’L. BAR ASS’N. RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, art. 4 (2010); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1903–05 (2009).

85. *Id.*

86. INT’L. BAR ASS’N. RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, art. 3 (2010).

87. *Id.* at art. 9.2.

88. BORN, *supra* note 84, at 1907.

of indigenous Ecuadorian plaintiffs in a David vs. Goliath battle against Chevron over alleged environmental damage in Ecuador. Scenes in the film depicted an *ex parte* meeting between plaintiffs' lawyers and a medical expert working with the Ecuadorian court-appointed Special Master, plaintiff lawyer Steven Donziger storming into an Ecuadorian judge's chambers, and Donziger declaring that you had to play dirty with litigation in Ecuador.<sup>89</sup> If such conduct made the final cut of the film, Chevron lawyers queried what evidence remained on the cutting room floor.

On the basis of these and similar scenes, Chevron filed a Section 1782 motion in the Southern District of New York against *Crude* director Joe Berlinger; requesting over six hundred hours of film outtakes. The district court granted the motion, finding that "[r]eview of Berlinger's outtakes will contribute to the goal of seeing not only that justice is done, but that it appears to be done."<sup>90</sup>

Chevron then filed over twenty-three motions for Section 1782 discovery against various third-party witnesses with knowledge of pertinent facts pertaining to the Ecuadorian litigation. These proceedings "have resulted in at least fifty orders and opinions from federal courts across the country."<sup>91</sup> The sheer extent of such Section 1782 discovery was, as the Third Circuit put it, "unique in the annals of American judicial history."<sup>92</sup> In every single case federal district courts granted in whole or in part Chevron's motions for ancillary discovery.

The results of the ancillary discovery orders allowed Chevron to present what it described as "shocking revelations" of fraud and corruption.<sup>93</sup> Among the direct quotes attributable to the Ecuador plaintiff lawyers were: (1) "All the judges [in Ecuador] are corrupt;" (2) "the only language . . . this judge is gonna understand is one of pressure, intimidation, and humiliation;" (3) "[In] Ecuador . . . this is how the game is played, it's dirty;" (4) "[The court-appointed Special Master will have] to totally play ball with us and let us take the lead while projecting the image that he is working for the court;" (5) "[A]ll this bull\*\*\*t about the law and facts . . . in the end of the day it is about brute force;" (6) "[We] could jack this thing up to thirty billion . . . in one day;" (7) "[Evidence of groundwater contamination] was smoke and mirrors and bull\*\*\*t, it really is;" and (8) "[I]f you repeat a lie a thousand times it becomes the truth."<sup>94</sup>

---

89. *Berlinger*, 709 F.Supp. 2d 283, 288–89 (S.D.N.Y. 2010) *aff'd* *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d. Cir. 2011); Patrick Radden Keefe, *Reversal of Fortune*, THE NEW YORKER (Jan. 2012).

90. *Berlinger*, 709 F.Supp. 2d at 299.

91. *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

92. *In re Chevron*, 650 F.3d 276, 282 n.7 (3d Cir. 2011).

93. Keefe, *supra* note 89.

94. Brief of Plaintiff-Appellee at 20-23, *Chevron v. Camacho*, 667 F.3d. 232 (2d. Cir. 2012) (No. 11-1150).

The outtakes and other evidence gathered pursuant to Section 1782 were, according to the Southern District of New York, “remarkably informative” about the entire Lago Agrio litigation, providing “ample evidence of fraud in the Ecuadorian proceedings.”<sup>95</sup> According to that court, the evidence gathered pursuant to ancillary discovery established, among other things: (1) that the appointment and independence of the Ecuadorian-court Special Master was irregular; (2) that the plaintiffs “ghost-wrote” the Special Master’s expert report; and (3) that the plaintiffs “orchestrated a campaign to intimidate the Ecuadorian judiciary.”<sup>96</sup> Another federal court found that the \$18 billion Lago Agrio judgment was a “virtual line-by-line entry” of an internal plaintiff document surreptitiously provided to the court but not placed in the record.<sup>97</sup> Other federal courts made similar findings of fraud.<sup>98</sup>

When deposed, Steven Donziger admitted under oath that plaintiffs’ expert consultant, Stratus Consulting, wrote parts of the Special Master’s expert report which the expert adopted verbatim.<sup>99</sup> Internal

---

95. *Chevron v. Donziger*, 768 F.Supp. 2d 581, 605, 636 (S.D.N.Y. 2011) *rev’d on other grounds*, 667 F.3d 232 (2d Cir. 2012).

96. *Id.* at 612. On the basis of this evidence, the district court enjoined the Ecuadorian plaintiffs from enforcing the judgment abroad. *Id.* at 633–34. On January 26, 2012, the Second Circuit reversed the district court’s antisuit injunction, concluding that there was no statutory authority under New York Recognition Act to issue such a declaratory injunction. *See Chevron Corp. v. Naranjo*, 667 F.3d 232, 234 (2d Cir. 2012). The Second Circuit expressed “no views on the merits of the parties’ various charges and counter-charges regarding the Ecuadorian legal system and their adversaries’ conduct of this litigation, which may be addressed as relevant in other litigation before the district court or elsewhere.” *Id.* at 248 n.17.

97. *Chevron v. Page*, RWT-11-1942 Dkt. 33, 73 (D. Md. Sept. 27, 2011).

98. *See, e.g., Chevron Corp. v. Weinberg Group*, No. 1:11-mc-00409-JMF, slip op. at 8 (D.D.C. Sept. 8, 2011) (“[T]here is more than sufficient evidence of a prima facie case that [plaintiffs’ consultant] the Weinberg Group’s work was part of a fraud upon the Ecuadorian court.”); *In re Application of Chevron Corp.*, 749 F. Supp. 2d 141, 167 (S.D.N.Y. 2010) (“[T]here is more than a little evidence that Donziger’s activities — as several courts already have held in the context of Section 1782 applications against experts involved on the Lago Agrio plaintiffs’ side — come within the crime-fraud exception to both the privilege and to work product protection.”); *In re Application of Chevron Corp.*, No. 10-cv-1146-IEG(WMc), 2010 WL 3584520, at \*6 (S.D. Cal. Sept. 10, 2010) (“There is ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own.”); *In re Chevron Corp.*, No. 1:10-mc-00021-JCH-LFG, slip op. at 3–4 (D.N.M. Sept. 2, 2010) (“The release of many hours of the outtakes has sent shockwaves through the nation’s legal communities, primarily because the footage shows, with unflattering frankness, inappropriate, unethical and perhaps illegal conduct.”); *Chevron Corp. v. Camp*, Nos. 1:10-mc-27, 1:10-mc-28, 2010 WL 3418394, at \*6 (W.D.N.C. Aug. 30, 2010) (“While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court.”).

99. *See* Deposition of Steven Donziger at 853, Case 1:10-cv-00047-MSK-MEH, Doc. 306-1 (“[Question:] ‘So it is a fact that Mr. Cabrera—that the Cabrera report was in part written by Stratus, isn’t it?’ [Donziger:] ‘Stratus wrote up parts of the report, or materials, I should say, that were adopted by him verbatim. So with that caveat, the answer to your question would be yes.’”).

correspondence between Ecuadorian plaintiffs' counsel conceded that the evidence "undermined the entire case and the credibility of the entire plaintiff's team"<sup>100</sup> and warned that public disclosure of their conduct could "destroy[] the proceedings" and result in "all of us, your attorneys, . . . go[ing] to jail."<sup>101</sup>

Despite this evidence, Ecuador has vigorously denied allegations of judicial misconduct and relied on ancillary discovery in the United States to rebut Chevron's claims of fraud and corruption. Since September 2010, Ecuador has filed at least fourteen separate Section 1782 discovery requests against third parties who have information relevant to Chevron's allegations.<sup>102</sup> In particular, Ecuador sought documents and depositions against adverse witnesses who are likely to testify against Ecuador in the international arbitration proceeding. The approach reflects Ecuador's decision to "take aggressive discovery of Chevron and other persons and entities within the United States for purposes of anticipating and countering Chevron's ongoing attempts to undermine and evade the Ecuadorian judgment."<sup>103</sup>

Chevron responded to Ecuador's request for ancillary discovery by demanding "reciprocal discovery" from Ecuador, relying on Section 1782 as a tool for direct American-style discovery of its sovereign adversary in the international proceeding.<sup>104</sup> Thus far, those requests have been denied, with a federal court finding that the evidence was located abroad, that the international tribunal could issue such an order, and that Ecuador had potential sovereign immunity defenses.<sup>105</sup> "The Court rejects Chevron's attempt to shoehorn wide-ranging discovery against parties to a foreign proceeding under the guise of 'reciprocal discovery' because it could

---

100. David R. Baker, *Chevron Finds a Useful Tactic in Ecuador Case*, SAN FRANCISCO CHRONICLE, Jan. 2, 2011 (quoting Aug. 9, 2010 letter from plaintiff lawyer Joseph Kohn).

101. Email from Julio Prieto to Steven Donziger, (Mar. 30, 2010, 2:02:53 PM) (on file with court case 1:11-cv-00691-LAK).

102. See, e.g., *In re* Application of Ecuador, Nos. C 11-80171 CRB, C 11-80172 CRB, 2011 WL 4434816 (N.D. Cal. Sept. 23, 2011); *In re* Application of Ecuador, No. 2:11-mc-00052 GSA, 2011 WL 4089189 (E.D. Cal. Sept. 13, 2011); *Republic of Ecuador v. Bjorkman*, No. 11-cv-01470-WYD-MEH, 2011 WL 5439681 (D. Colo. Nov. 9, 2011); *Republic of Ecuador v. Bjorkman*, 801 F.Supp. 2d 1121 (D. Colo. 2011); *In re* Application of Ecuador, Nos. C-10-80225 MISC CRB (EMC), C-10-80324 MISC CRB (EMC), 2011 WL 736868 (N.D. Cal. Feb. 22, 2011); *In re* Application of Ecuador, No. C-10-80225, 2010 WL 4973492 (N.D. Cal. Dec. 1, 2010); *In re* Application of Ecuador, No. 1:10-mc-00040 GSA, 2010 WL 4027740 (E.D. Cal. Oct. 14, 2010); *In re* Application of Ecuador, No. C-10-80225, 2010 WL 3702427 (N.D. Cal. Sept. 15, 2010).

103. PATTON BOGGS, INVICTUS MEMO, PATH FORWARD: SECURING AND ENFORCING JUDGMENT AND REACHING SETTLEMENT, at 8, available at <http://tinyurl.com/a5n5rhs> [hereinafter INVICTUS MEMO].

104. *In re* Application of Ecuador, 2011 WL 736868, at \*10.

105. *Id.*

circumvent [the] statutory scheme under § 1782 established by Congress.”<sup>106</sup>

Regardless of the ultimate outcome of *Chevron v. Ecuador*, the ability to request ancillary discovery has proven essential to Chevron’s denial of justice claims. Section 1782 discovery was the vehicle for discovering virtually all of the key evidence in support of its claims. This evidence would have been difficult, perhaps impossible, to procure through the discovery procedures in place in international arbitration. The discovery was sought from third parties to the arbitral proceeding. Depositions of adverse witnesses were routinely requested and granted. Claims of privilege were frequently denied, including claims of attorney-client privilege, attorney work product, and journalist privilege.<sup>107</sup> The scope of documentary evidence was voluminous, far in excess of the “narrow and specific requested category of documents” permitted under the evidentiary standards of international arbitration.<sup>108</sup> Pursuant to one order alone, Steven Donziger handed over 200,000 pages of material to Chevron, spanning almost two decades.<sup>109</sup> Chevron’s deposition of Donziger lasted eight days and produced a 2,400 page transcript.<sup>110</sup> No respondent has dared to refuse compliance with discovery orders, because to do so risked being found in contempt of court.<sup>111</sup>

Thus far, ancillary discovery is having its intended effect in *Chevron v. Ecuador*’s international proceedings. On February 9, 2011, the international tribunal adjudicating Chevron’s denial of justice claim concluded that Chevron “[had] made out a sufficient case” for interim measures and ordered Ecuador to “take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the Lago Agrio case.”<sup>112</sup> On January 25, 2012, the tribunal confirmed and reissued the February 9, 2011 Order as an Interim Award, ordering Ecuador “to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron] in the Lago Agrio case.”<sup>113</sup> That Interim Award is final and

---

106. *Id.*

107. *See, e.g., In re Chevron*, 633 F.3d 153 (3d Cir. 2011); *Chevron v. Berlinger*, 629 F.3d 297 (2d Cir. 2011); *In re Chevron*, 749 F.Supp. 2d 141, (S.D.N.Y. 2010); *Chevron v. Camp*, 2010 WL 3418394 (W.D.N.C. 2010).

108. *See supra* note 82–86 and accompanying text.

109. Keefe, *supra* note 89.

110. Deposition of Steven Donziger (Nov. 29, 2010 to Dec. 29, 2010), *available at* <http://tinyurl.com/a879j7n>.

111. *See, e.g., Berlinger*, 709 F.Supp. 2d 283, 300–01 (S.D.N.Y. 2010) *aff’d* *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).

112. *Chevron v. Ecuador*, PCA Case No. 2009-23, Order for Interim Measures, 3 (Feb. 9, 2011), *available at* <http://tinyurl.com/ajzohqy>.

113. *Chevron v. Ecuador*, PCA Case No. 2009-23, First Interim Award, 16 (Jan. 25, 2012).

binding and subject to recognition and enforcement in domestic courts in Ecuador and elsewhere. Finally, on February 16, 2012, the tribunal issued a Second Interim Award finding that Chevron has made a sufficient case regarding “the Claimants’ case on the merits against the Respondent” and ordered Ecuador to prevent the Lago Agrio judgment from becoming final and binding by precluding “any certification by the Respondent that would cause the said judgments to be enforceable against” Chevron.<sup>114</sup>

Despite the February 9, 2011 interim measures, on January 3, 2012, an Ecuadorian appeals court affirmed the Lago Agrio judgment, rendering the \$18 billion judgment enforceable abroad.<sup>115</sup> The Ecuadorian plaintiffs have identified twenty-seven nations where Chevron has substantial activities, and may soon seek to enforce the Lago Agrio judgment abroad. The principal defense Chevron will raise in any such enforcement action will be based on the evidence gathered pursuant to Section 1782. The key facts relevant to a denial of justice claim are also relevant when defending against a foreign judgment enforcement proceeding. Thus, ancillary discovery in aid of international arbitration could play a fundamental role in future enforcement proceedings in foreign courts around the world.

#### IV. IMPLICATIONS

There are several fundamental implications one may draw from this review of ancillary discovery under Section 1782.

##### A. *The Comity of Courts*

Section 1782 discovery orders in aid of international tribunals reflect sensitivity to the comity of courts, not the comity of nations.<sup>116</sup> When Congress amended the statute in 1964, it distinguished between ancillary discovery in aid of foreign and international proceedings. With respect to assistance to foreign court proceedings, federal courts should consider the “nature and attitudes of the government from which the request emanates and the character of the proceedings in that country.”<sup>117</sup> With international tribunals, by contrast, the Senate Report stated that federal courts should consider “the nature of the tribunal and the character of the proceedings

---

114. *Chevron v. Ecuador*, PCA Case No. 2009-23, Second Interim Award, 2–3 (Feb. 16, 2012).

115. Cause No. 2011-0106 (Jan. 3, 2012), available at <http://tinyurl.com/ant37du>.

116. The comity of courts concerns the practice of “judges declin[ing] to exercise jurisdiction over matters more appropriate adjudged elsewhere.” *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993). See also Donald Childress III, *Comity as Conflict: Resituating International Comity as Conflicts of Laws*, 44 U.C. DAVIS L. REV. 11, 61 (2010) (“Judicial comity is . . . a distinct doctrine from the ‘comity of nations’ because it involves a relation between courts and not between sovereigns as such.”); Michael Ramsey, *Escaping “International Comity,”* 83 IOWA L. REV. 893, 897–906 (1999) (discussing judicial comity).

117. S. Rep. No. 88-1580 (1964), reprinted in U.S.C.C.A.N. 3782, 3788.

before it.”<sup>118</sup> Clearly a foreign government’s attitude with respect to federal court assistance to international tribunals was not mentioned as a discretionary factor.

The Supreme Court addressed the Senate Report in *Intel* in the most cursory fashion, eliding the discretionary factors applicable to foreign proceedings with those of international proceedings.

[A]s the 1964 Senate Report suggests, a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.<sup>119</sup>

The best reading of this cryptic admonition is to consider the receptivity factor in the disjunctive. If the ancillary discovery is in aid of foreign court proceedings, then the receptivity of the foreign government is relevant.<sup>120</sup> If, by contrast, the ancillary discovery is in aid of international tribunal proceedings, then the receptivity of the international tribunal is relevant.<sup>121</sup> The fact that a foreign government is a party in that proceeding does not mean that its receptivity to the request is relevant.

In other words, to the extent that comity is relevant to a Section 1782 analysis, it is relevant for balancing the interests of judicial coordination between the ancillary federal court ordering discovery and the primary foreign or international tribunal resolving the claim. This conclusion is particularly important in the denial of justice context. To the extent ancillary discovery is in aid of international proceedings adjudicating questions of foreign judicial misconduct, there frequently will be both foreign court and international tribunal proceedings. If the Section 1782 request is for use in both proceedings, then the receptivity of the international tribunal *and* the foreign government will be relevant to any determination whether to grant or deny an ancillary discovery request.<sup>122</sup> But if the evidence is intended for use only in the international proceeding to establish a denial of justice in a foreign proceeding, then the attitude of the foreign government or a foreign court’s receptivity to such discovery is irrelevant.<sup>123</sup>

This conclusion follows from the nature and purpose of investment arbitration. By signing a bilateral investment treaty, sovereigns invite international tribunals to scrutinize their behavior. Therefore they do not

---

118. *Id.*

119. *Intel Corp. v. Advanced Microdevices, Inc.*, 542 U.S. 241, 264 (2004).

120. *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84–85 (2d Cir. 2004).

121. *In re Chevron Corp.*, 749 F.Supp. 2d 141, 161 (S.D.N.Y. 2010); *see also In re Chevron Corp.*, 2010 WL 4883111, at \*3.

122. *In re Application of Chevron Corp.*, 633 F.3d 153, 161–63 (3d Cir. 2011).

123. *Id.* at 161.

expect an international tribunal to accord deference and respect to their sovereign conduct, including the conduct of the judicial branch. It follows that courts addressing Section 1782 discovery requests in aid of investment arbitration will likewise consider the attitude of the international tribunal, but not the attitude of the foreign sovereign responding to allegations of judicial impropriety.

Of course, an international tribunal's receptivity is relevant to ancillary discovery. Courts, however, neither give such receptivity dispositive weight, nor do they give any weight to an international tribunal's silence.<sup>124</sup> Furthermore, courts have not followed the recommendation of some influential commentators suggesting that, in the interest of judicial comity, courts should limit Section 1782 discovery requests to only those issued or approved by the international tribunal.<sup>125</sup> Rather, courts liberally apply the congressional policy of providing "equitable and efficacious procedures for the benefit of tribunals *and* litigants."<sup>126</sup> One might say that courts remain skeptical of a broad application of judicial comity and take seriously the "virtually unflagging obligation" to exercise the jurisdictional authority granted to them under Section 1782.<sup>127</sup> Thus far, international tribunals have not objected to this method of ancillary discovery,<sup>128</sup> and, at least in the Chevron-Ecuador dispute, have used evidence gathered pursuant to Section 1782 to issue orders and awards against Ecuador.<sup>129</sup>

### B. *American-Style Discovery in International Proceedings*

Through Section 1782, Congress has demonstrated a commitment to facilitate ancillary discovery at home for proceedings abroad, and to do so consistent with American understandings of the proper scope of discovery. That style of discovery may be limited at the discretion of a federal court, but the default rule is to treat ancillary discovery in aid of foreign or international proceedings the same as any other type of

---

124. See, e.g., *In re Chevron Corp.*, 633 F.3d at 163; *In re Republic of Ecuador*, No. 2:11-mc-00052 GSA, 2011 WL 4089189, at \*3 (E.D. Cal. Sept. 13, 2011); *Berlinger*, 709 F.Supp. 2d 283, 292 & n. 51 (S.D.N.Y. 2010); *In re Republic of Ecuador*, Nos. C-10-80225 MISC CRB (EMC), C-10-80324 MISC CRB (EMC), 2011 WL 736868, at \*7 (N.D. Cal. Feb. 22, 2011); *In re Chevron Corp.*, 762 F.Supp. 2d 242, 250–52 (D. Mass. 2010); *In re Chevron Corp.*, Nos. 10-MC-208, 10-MC-209, 2010 WL 5173279, at \*5 (E.D. Pa. Dec. 20, 2010); *In re Application of Ricardo Veiga*, 746 F.Supp. 2d 8, 23–24 (D.D.C. 2010); *In re Republic of Ecuador*, 2010 WL 4027740, at \*2 (E.D. Cal. Oct. 14, 2010).

125. See, e.g., Committee on International Commercial Disputes of the Association of the Bar of the City of New York, 28 U.S.C. § 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration — *Applicability and Best Practices*, 63 THE RECORD 752, 778–79 (2008); BORN, *supra* note 84, at 1935.

126. S.REP. No. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3793 (emphasis added).

127. *But cf.* *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393–94 (3d Cir. 2006).

128. See *Chevron v. Camp*, 2010 WL 3418394, at \*5 (W.D.N.C. Aug. 30, 2010).

129. See *Chevron v. Ecuador*, PCA Case No. 2009-23, Order for Interim Measures, 3–4 (Feb. 9, 2011); *Chevron v. Ecuador*, PCA Case No. 2009-23, Interim Award, 16–19 (Jan. 25, 2012).



discovery. In the exercise of their jurisdiction to facilitate ancillary discovery, federal courts routinely apply this default approach consistent with Congress' intent. The result is the indirect incorporation of American-style discovery into foreign and international proceedings.

This liberal approach to discovery is particularly important for third-party discovery. In most cases third parties are beyond the reach of international tribunals, and not surprisingly, third parties are the principal target of Section 1782 discovery requests. In the denial of justice context, the rise of Section 1782 affords investors a powerful tool to establish allegations that a foreign judgment was procured by fraud. The litigant that allegedly engaged in fraud in the foreign proceeding is not a party to the international proceeding and therefore amenable to ancillary discovery without offending the *Intel* discretionary factors.<sup>130</sup>

American-style discovery in international proceedings has the obvious potential for abuse. For example, in furtherance of its efforts to establish that the Ecuadorian judgment was procured by fraud, Chevron reportedly issued subpoenas to Google, Yahoo, and Microsoft to access almost a decade of email logs of over 100 email addresses, including those with no direct relationship to the dispute.<sup>131</sup> Among the individuals whose email logs were sought was an international law professor who blogs at *Opinio Juris* and has no involvement in the case beyond critical commentary of Chevron.<sup>132</sup> Chevron maintains that the subpoenas are necessary to determine whether the email accounts belong to key participants in the dispute, while those subject to the subpoena allege that Chevron is trying to harass and intimate its critics.<sup>133</sup>

As noted above, such liberal discovery runs counter to traditional understandings of evidence gathering that have developed in international

---

130. To the extent an international tribunal has the authority to order third party discovery under Section 7 of the Federal Arbitration Act, that power may undermine arguments that Section 1782 discovery is necessary. See 9 U.S.C. § 7 (“[A]rbitrators . . . may summon . . . any person to attend before them . . . as a witness and . . . to bring with him or them any . . . document . . . which may be deemed material as evidence in the case.”); BORN, *supra* note 84, at 1926–33 (discussing arbitral tribunal authority under Section 7 to order testimony and document production, including by third parties, in appropriate circumstances). If an arbitral tribunal has the authority to order third party discovery, then the *Intel* discretionary factors may suggest that federal court assistance is unwarranted. No court since *Intel* has addressed this relationship between Section 1782 and Section 7 of the FAA. Because Section 7 only applies to arbitrations seated in the United States, the potential overlap between Section 1782 and Section 7 does not apply for most ancillary discovery requests that have been made in recent years, including all such requests in the Chevron-Ecuador context.

131. Declan McCullagh, *Chevron Targets Google, Yahoo, Microsoft E-mail Accounts*, (Oct. 11, 2012, 3:05 PM), <http://tinyurl.com/bhgpy49>; David R. Baker, *Chevron Seeks Email Logs in Ecuador Suit*, SAN FRANCISCO CHRONICLE, Oct. 1, 2012 available at <http://tinyurl.com/9wh6b62>.

132. Kevin Jon Heller, *My Encounter with a Chevron Subpoena — and the ACLU's Assistance (Updated)*, (Sept. 28, 2012, 10:00 AM), <http://tinyurl.com/9mt29xu>.

133. *Id.*; Brian Hauss, *Chevron Asks Email Providers to Hand Over Users' Private Information*, (Oct. 5, 2012, 2:03 PM), <http://tinyurl.com/am2f25r>.

proceedings. To the extent this trend is viewed with alarm, there are opportunities to curtail it. The parties are free to incorporate discovery limits in the arbitration agreement. This could be done expressly in the contract or by incorporating such a limit in the arbitration rules. The LCIA Arbitration Rules, for example, provide that “[b]y agreeing to arbitration under these rules, the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any order available from the Arbitral Tribunal . . . except with the agreement in writing of all parties.”<sup>134</sup> Alternatively, the arbitral tribunal could impose such a limit in procedural orders at the beginning of the arbitration. For example, incorporating the *IBA Rules on the Taking of Evidence in International Arbitration* as binding rules of evidence arguably would limit the freedom to pursue third-party discovery without leave from the tribunal.<sup>135</sup> Finally, if parties are abusing the Section 1782 process, an arbitral tribunal has the authority to issue an order preventing such behavior.<sup>136</sup>

Of course, there is no assurance that a federal court will recognize any such attempted limits on ancillary discovery. Although courts are admonished to avoid granting a Section 1782 request that “conceal[s] an attempt to circumvent foreign proof-gathering restrictions.”<sup>137</sup> This, however, is but one of many factors under consideration when ordering ancillary discovery.

### C. *Evidentiary Forum Shopping*

Not surprisingly, the option of resorting to American-style discovery has encouraged evidentiary forum shopping. Liberal discovery pursuant to Section 1782 affords litigants an attractive alternative to the limited discovery procedures available in international arbitration or foreign litigation.

There are numerous examples of such forum shopping. Rather than rely on the French courts to gather evidence of a French national pursuant to a French proceeding, litigants serve him discovery requests while he is visiting the United States.<sup>138</sup> Rather than rely on the limited discovery

---

134. LCIA Arbitration Rules, art. 22(2); BORN, *supra* note 84, at 1936.

135. INT’L. BAR ASS’N. RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, art. 3.9 (2010) (“If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself.”).

136. For a discussion of arbitrators as discovery gatekeepers, see Giacomo Rojas Elgueta, *Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators*, 16 HARV. NEGOT. L. REV. 165, 180–91 (2011).

137. *Intel Corp. v. Advanced Microdevices, Inc.*, 542 U.S. 241, 265 (2004).

138. *In re Edelman*, 295 F.3d 171, 174, 180 (2d Cir. 2002).

available in German courts, a German plaintiff seeks millions of documents from its American adversary under liberal American discovery rules.<sup>139</sup> Rather than seek emails that reveal fraud from a foreign account holder, the alleged victim of fraud requests such emails from Google, the domestic registrar of the email account.<sup>140</sup> Rather than examining Chevron's expert witness pursuant to the procedures established under international arbitration, Ecuador secures an order for the expert to produce documents and submit to a deposition.<sup>141</sup> Rather than waiting to gather evidence from Ecuador in international arbitration, Chevron uses the liberal standards of Section 1782 in an effort to gather evidence directly from Ecuador.<sup>142</sup> Of course, the *Intel* discretionary factors were designed in part to prevent such behavior, but in most cases federal courts have granted such discovery requests.

As discovery procedures in international arbitration crystallize toward a hybrid model that adopts elements of civil law and common law discovery, counsel — especially American counsel — will use the limits inherent in the system to justify recourse to Section 1782 discovery. To the extent this hybrid model of evidentiary standards is viewed as a jurisdictional limit on the tribunal rather than a discovery restriction imposed on the parties, there is no basis to argue that Section 1782 requests reflect an attempt to circumvent proof-gathering restrictions. On the other hand, if these evidentiary standards are viewed as limits on the power of parties to pursue discovery by other means, then Section 1782 requests may circumvent arbitral proof-gathering restrictions.<sup>143</sup>

Evidentiary forum shopping is also evident in the choice of whom to target for discovery. In the denial of justice context where there are allegations that a judgment was procured by fraud, evidence of such fraud could be procured either from a party to the investment arbitration, from third parties, or both. In the Chevron-Ecuador dispute, for example, much of the evidence Chevron sought could be procured from either Ecuadorian judicial officials or the Ecuadorian plaintiffs and their consultants who allegedly colluded with those officials. By opting to discover such information from the Ecuadorian plaintiffs and consultants rather than the Ecuadorian judiciary, Chevron engaged in a version of evidentiary forum shopping. Chevron calculated that the payoffs of Section 1782 discovery from the Ecuadorian plaintiffs would be greater than the payoffs of arbitration discovery from the Ecuadorian judicial

---

139. *Kulzer v. Biomet, Inc.*, 633 F.3d 591, 595 (7th Cir. 2011).

140. *In re Beluga Shipping GmbH & Co.*, 2010 WL 3749279 at \*4–5.

141. *In re Application of Ecuador*, 2011 WL 4434816, at \*5 (N.D. Cal. Sept. 23, 2011); INT'L. BAR ASS'N. RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION art. 5 (2010).

142. *In re Application of Ecuador*, 2011 WL 736868, at \*10 (N.D. Cal. Feb. 22, 2011).

143. *In re Application of Caratube Int'l Oil Co.*, 730 F.Supp. 2d 101, 105–07 (D.D.C. 2010); BORN, *supra* note 84, at 1935–36.

officials. Given the scope and timing of such evidentiary payoffs, it is hard to conclude otherwise.

There are legitimate concerns about transposing American discovery into foreign and international proceedings. While Chevron's recourse to ancillary discovery has been critical to advance its due process claims, this approach has its disadvantages. The grafting of American discovery into these proceedings increases costs and imposes delays. If left unchecked, the Americanization of international arbitration or foreign litigation through Section 1782 discovery could threaten to undermine many of the perceived advantages of these alternative forums.

If the potential for abuse of ancillary discovery is obvious, the solution is equally obvious. The ability to limit ancillary discovery is built into the existing system at numerous levels. Federal courts have the statutory discretion to limit discovery to that which is available in international arbitration or foreign proceedings.<sup>144</sup> For example, the Supreme Court in *Intel* ordered courts to exercise caution in granting ancillary discovery. In addition, foreign courts are authorized to control discovery and impose limits on the parties' fact-finding. International arbitrators are empowered by existing arbitration rules to control discovery and regulate recourse to ancillary discovery proceedings. Finally, the parties themselves may impose contractual limits to circumscribe the scope of Section 1782 proceedings.

To the extent Chevron's approach becomes the norm rather than the exception; greater control of evidentiary forum shopping may need to be imposed. This could be done by altering the *status quo*, either through amendments to arbitration institution rules that limit ancillary discovery, or statutory amendments to Section 1782 that reverse the default presumption of American-style discovery.

#### D. *Two-Level Games and Altering Incentives*

Providing foreign investors with a remedy for denial of justice, together with a robust means to prove such a violation, alters the host state's behavioral incentives. In the typical denial of justice context where there is judicial corruption or similar violations of fundamental due process, a state often has an economic incentive to engage in such misconduct, whether that incentive is to cancel a debt, justify illegal executive action, respond to public preferences, or improperly adjudicate claims against foreigners for the general welfare.<sup>145</sup>

A denial of justice claim imposes economic burdens on the state for judicial impropriety. In a recent denial of justice claim against Ecuador, the international tribunal ordered Ecuador to pay almost \$700 million for the

---

144. 28 U.S.C. § 1782(a).

145. See *supra* note 9–25 and accompanying text.

Ecuadorian courts' failure to resolve claims that Chevron had against state-owned TexPet.<sup>146</sup> In the current denial of justice claim that Chevron has filed against Ecuador, if the tribunal determines there has been a denial of justice, Ecuador could be required to pay to Chevron the equivalent amount that Chevron is required to pay to the Ecuadorian plaintiffs pursuant to the outstanding \$18 billion judgment. By assigning costs on the sovereign for the damage arising from a denial of justice, the sovereign is induced to change its behavior, thereby enhancing the likelihood that the sovereign will decide against inflicting future injury.<sup>147</sup>

Ancillary discovery to establish a denial of justice is an important component of this incentive structure. Creating an effective means to establish evidence of judicial misconduct alters the risk-reward calculus of a sovereign considering whether to deny foreign investors fundamental due process. Mounting evidence of fraud enhances the likelihood of success on the merits. Arguably, that is one of the reasons Chevron filed a denial of justice claim in September 2009 as soon as evidence of alleged corruption came to light, but before the Ecuadorian district court issued the \$18 billion Lago Agrio decision on the merits. Chevron is hoping — so far unsuccessfully — to alter Ecuador's incentive calculus.

More broadly, the Chevron-Ecuador dispute illustrates the unusual complexity of the two-level game in which the state tries to reconcile domestic and international imperatives simultaneously. Moves that are quite rational for Ecuador at the domestic level may be irrational at the international level, and vice versa. At the national level, the Ecuadorian government adopts policies and practices that satisfy domestic constituent interests, such as rendering a dubious judgment that redistributes wealth from a foreign corporation to millions of constituents. At the international level, Ecuador seeks to minimize the adverse consequences of foreign developments, such as the specter of an international arbitral award ordering Ecuador to compensate Chevron for the billions it was improperly required to pay to Ecuadorian plaintiffs. Two-level game theory assumes that government decision-makers will strive to reconcile domestic and international imperatives simultaneously.<sup>148</sup> The filing of an international arbitration claim alleging a denial of justice, combined with discovery tools that effectively establish an international law violation, requires the state to satisfy constituencies at both the domestic and

---

146. Chevron Corp. & Texaco Petroleum Co. v. Ecuador, Partial Award (Mar. 30, 2010), para. 550 available at <http://tinyurl.com/b54cc25>.

147. See Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 527–28 (2008).

148. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434, 460 (1988). For a discussion applying two-level game theory to explain international law compliance, see Joel Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHI. J. INT'L L. 127, 153–55 (2010). For a discussion of discovery and game theory, see Elgueta, *supra* note 136, at 177–78.

international levels, by pursuing paths that reconcile the international obligation with the domestic political preference.

## CONCLUSION

Section 1782 is a longstanding discovery tool that only recently is receiving the attention it deserves. There is every reason to believe that recourse to such ancillary discovery will continue to grow in the coming years. Prior to *Intel*, the statute was of modest importance, utilized in approximately two cases per year.<sup>149</sup> Since *Intel*, there has been a veritable explosion in ancillary discovery requests, with twice as many federal court decisions addressing Section 1782 requests in the past eight years as there were in the forty years prior.<sup>150</sup> Interpreting the statute to apply to international arbitration has greatly expanded the opportunities for Section 1782 discovery. The rise of ancillary discovery in aid of international arbitration will follow from the growth of such arbitration.<sup>151</sup> Many of these will afford ample opportunity to pursue ancillary discovery.

This growth also portends growing scholarly interest in the subject. Currently there is precious little scholarship regarding ancillary discovery under Section 1782,<sup>152</sup> and none addressing ancillary discovery in aid of investment arbitration. As I have suggested in this article, ancillary discovery to prove a denial of justice claim raises special concerns that merit serious reflection.

---

149. Based on a Westlaw search of cases from 1964, when the statute was amended, to 2004, when *Intel* was decided, there have been 94 reported cases addressing Section 1782 requests in forty years.

150. Based on Westlaw search there have been 190 reported Section 1782 cases since *Intel* was decided in 2004, and a majority of those were reported in the past three years.

151. According to the World Bank, there are 163 pending investment arbitration cases currently administered under ICSID procedures. ICSID PENDING CASES, <http://tinyurl.com/c6bqzbh> (last visited Nov. 15, 2012). The ICC reported almost 800 requests for international commercial arbitration in 2010, and surveys of the major arbitration institutions identify over 3,000 international arbitrations filed every year. FACTS AND FIGURES ON ICC ARBITRATION — 2010 STATISTICAL REPORT, available at <http://tinyurl.com/b7ndgxd>; QUEEN MARY SCHOOL OF INTERNATIONAL ARBITRATION, ARBITRATION INSTITUTIONS/STATISTICS, available at <http://tinyurl.com/baeujr4>.

152. See, e.g., Alan Rau, *Evidence and Discovery in American Arbitration: The Problem of "Third Parties,"* 19 AM. REV. INT'L ARB. 1, 28–39 (2008); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 334–41 (2008). To the extent there is commentary, almost all of it is limited to practitioner articles or student notes. See, e.g., Kenneth Beale et al., *Solving the § 1782 Puzzle: Bringing Certainty to the Debate over 28 U.S.C. § 1782's Application to International Arbitration*, 47 STAN. J. INT'L L. 51, 67–89 (2011); Jenna M. Godfrey, Comment, *Americanization of Discovery: Why Statutory Interpretation Bars 28 U.S.C. § 1782(a)'s Application in Private International Arbitration Proceedings*, 60 AM. U. L. REV. 475, 492–98 (2010); Marat A. Massen, *Discovery for Foreign Proceedings After Intel v. Advanced Micro Devices: A Critical Analysis of 28 U.S.C. § 1782 Jurisprudence*, 83 S. CAL. L. REV. 875 (2010); Pedro J. Martinez-Fraga, *The Future of 28 U.S.C. § 1782: The Continued Advance of American-Style Discovery in International Commercial Arbitration*, 64 U. MIAMI L. REV. 89 (2009); Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 AMER. REV. INT'L ARB. 61, 61–89 (2008).

Fortunately, the Chevron-Ecuador dispute has greatly enhanced the public profile of ancillary discovery under Section 1782, with the past two years witnessing the greatest recourse to ancillary discovery in the statute's history. The Chevron-Ecuador dispute could prove to be a watershed event in the history of the statute, including scholarly analysis of the use of American-style discovery in aid of foreign and international proceedings.